Neither did he respond in writing. In view of the poor relationship which exists between the two parties, would it not be preferable that the plaintiff concentrates on his duties to the Ministry [which he must perform in accordance with the directions of the Minster-Section 15(2)] and let another member carry out the duties of Dewan's Secretary-General? I make this observation in the interests of both the members of the Dewan and the Government of the State of Sabah. In The Law of Domestic Inquiries and Dismissal (at p. 37) "... in the final analysis what matters most is not who is right but what is right".

I am reminded by the English White Book 1988 that O. 28 r. 4, confers wide powers on the Court and approximates the rights of the plaintiff in an action begun by originating summons to those under O. 13, 14 and 19. See also Mallal's Supreme Court Practice on this matter. On the evidence given on affidavits, the statements made from the bar and upon consideration of the facts and legal principles, I am not inclined to granting the two declarations and the injunction which plaintiff seeks and accordingly I dismiss plaintiff's originating summons dated 28 August 1991. I make no order as to costs.

SENG CHOON HARDWARE (M) SDN. BHD.

v.

THE DIRECTOR GENERAL OF KASTAM & EKSAIS DI RAJA M'SIA AND THE GOVERNMENT OF MALAYSIA

HIGH COURT, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[CIVIL SUIT NO. D5-C3206-83]
11 JANUARY 1993

PRACTICE & PROCEDURE: Application to amend defence - Application made when plaintiffs had tendered nearly all their evidence - Amendment to plead new defence of limitation - Whether amendment will prejudice plaintiffs - Whether plaintiffs can be compensated in costs.

The plaintiffs claim is in respect of the alleged wrongful seizure of the plaintiffs' valves by the defendants and for the return of money which the plaintiffs say they paid under duress as customs duties on valves which they allege were not dutiable.

During the course of the trial the defendants applied to amend their defence to plead limitation which amounted to a new defence.

Held:

[1] This defence was clearly available to the defendants from the very outset. The application was made at the time when the plaintiffs had already tendered nearly all their evidence.

[2] The proposed defence being a plea of limitation will, if successful, afford the defendants a complete defence to the plaintiffs' second claim which is quite substantial. The prejudice that the proposed amendment will cause the plaintiffs cannot be compensated by costs.

[Application to plead limitation refused].

Cases referred to:

Mahan Singh v. Government of Malaysia [1973] 2 MLJ 149 ***(refd)***
Tildesley v. Harper 10 Ch. D 386, 397 ***(refd)***
Clarapede & Co. v. Commercial Union Association 32 WR 263 ***(refd)***
Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. [1983] 1 CLJ 191 / [1983] 1 MLJ 214 ***(foll)***
Hipgrave v. Case [1885] 28 Ch. D. 356 ***(foll)***

Legislation referred to:
Customs Act 1967, s. 16 (Revised - 1980)
Public Authorities Protection Act 1948, s. 2(a) (Revised - 1978)
Rules of the High Court 1980, O. 20
Rules of the Supreme Court 1980, O. 28

For the applicants / defendants - Mary Lim Thiam Suan; Jabatan Peguam Negara
For the respondents / plaintiffs - Zainur Zakaria; T/n. Zainur & Maydien

JUDGMENT

Wan Adnan bin Ismail J:
By the statement of claim dated 30 November 1983 the plaintiffs claim against the defendant:

(i) for the sum of RM362,851.69 (specified in paragraph l6 of the statement of claim) as damages suffered by the plaintiffs for wrongful seizure of the plaintiffs' gate valves on 5 November 1974; and
(ii) for the sum of RM254,756.99 (specified in paragraph 19) being money paid under duress by the plaintiffs to the defendants as custom duties on gate valves which they allege were not dutiable.

By their defence dated 31 March 1984 the defendants say in paragraph 5 in respect of claim (1) above as follows:

> 5. With regard to paragraph 10 to 14 of the statement of claim the defendants aver that the said claim of the plaintiff is time-barred by virtue of s. 2(a) of the Public Authorities Protection Act 1948 (Revised - 1978) in that the High Court in dismissing the appeal of the defendants on the 29 June 1979 ordered the return of the said goods to the plaintiff. The High Court on the said date did not make a further order for a stay of execution.

In respect of claim (ii) above the defendants say in paragraph 8 as follows:

> 8. The defendants further aver that the said claims in paragraph 19 of the statement of claim are time-barred by virtue of s. 16 of the Customs Act 1967 (Revised - 1980).

On 1 October 1984 pursuant to the order of the Court dated 21 November 1984 the defendants amended their defence with the addition of a new paragraph - (which is not relevant for this appeal).

Pursuant to the order of the Court dated 2 August 1985 the plaintiffs amended their statement of claim to include a claim for "the sum of RM259,401.05 being the cost of the gate valves and globe valves."

The plaintiffs again amended their statement of claim pursuant to the order of the Court dated 10 October 1990 to include a claim for loss of profit amounting to RM192,590.35. But the character of the plaintiffs' claim had not changed.

The hearing started on 20 August 1990. At about 2.30 p.m. on the same day the Senior Federal Counsel applied for postponement to negotiate for a settlement. Since that date the hearing had been postponed a number of times to give time to the Senior Federal Counsel to obtain the necessary consent of the Treasury to the proposed settlement. The consent never came. The hearing was continued on l, 2, 22 and 23 October 1992. When hearing resumed on 25 November 1992 the Senior Federal Counsel made an oral application to make amendments to the defence. I did not allow her to make the application orally and directed her to make the application by way of summons-in-chambers. In the mean time the hearing continued and the plaintiffs would have closed their case if not for the intended application.

The summons-in-chambers (Enc. 61) was filed and heard on 28 November 1992.

The application was to add three paragraphs to the defence, mainly:

> 3. Paragraph 4 is denied and the plaintiff is put to strict proof thereof. The defendants further aver that the said gate-valves and glove-valves were at all material times classified under Tariff - Code No. 84.61-110.
>
> 8. Further and/or in the alternative the defendants aver that at all material times the said goods were court exhibits retained pending the final disposal of the matter therein.
>
> 12. Further, the defendants aver and say that the claims for the years from 1975 to 1978 are barred by virtue of s. 2(a) of the Public Authorities Protection Act 1948 and the claims for the years 1978 to 1981 are barred by virtue of s. 2(a) of the Public Authorities Protection Act 1948 (Revised 1978).

I allowed the amendments in paragraphs 3 and 8 but refused the amendments in paragraph 12. Against this refusal the defendants now appeal.

In substance plaintiffs' claim is twofold. One is in respect of the alleged wrongful seizure of the plaintiffs' valves and the other for the return of money which the plaintiffs say they had paid under duress as customs duties on valves which they allege are not dutiable. As against the first claim the defendants claim protection (time-barred) under s. 2(a) of the Public Authorities Protection Act 1948 (Revised 1978). As against the second claim the defendants claim protection (time-barred) under s. 16 of the Customs Act 1967 (Revised - 1980). By the amendment in the proposed paragraph 12 the defendants are now also desirous of claiming protection under s. 2(a) of the Public Authorities Protection Act as against this second claim.

In *Mahan Singh v. Government of Malaysia* [1973] 2 MLJ 149, Sharma J. quoted with approval a passage from the judgment of Bramwell LJ in the case of *Tildesley v. Harper* 10 Ch. D. 386, 397.

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

His Lordship also quoted a passage from the judgment of Brett MR ln *Clarapede & Co. v. Commercial Union Association* 32 WR 263.

> However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

In *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd.*[1983] 1 MLJ 214 Mohamed Azmi (FJ. as he then was) said -

> Under O. 20 of the Rules of the High Court 1980, which is equivalent to O. 28 Rules of Supreme Court, a Judge has a discretion to allow leave to amend pleadings. Like any other discretion, it must of course be exercised judicially. The general principle is that the Court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is *bona fide*; (2) whether the prejudice caused to the other side can be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

Here in the present case the defendants are applying to put in a new defence. This defence was clearly available to the defendants from the very outset. The defendants had chosen to claim protection of s. 2(a) of the Public Authorities Protection Act 1948 only in respect of the first claim. For the second claim they had only chosen to claim protection under s. 16 of the Customs Act 1967. This application was made at the time when the plaintiffs had already tendered nearly all their evidence. The defendants should have asked for the amendment at a much earlier stage.

> The Court will not readily allow at the trial an amendment, the necessity for which was abundantly clear months ago, and then not asked for. *Hipgrave v. Case* [1885] 28 Ch. D. 356.

In the circumstances of the case I find that the amendment proposed in paragraph 12 will prejudice the plaintiffs. Can the plaintiffs be compensated by costs? The proposed defence being a plea of limitation (if successful) will afford the defendants a complete defence to the plaintiffs' second claim which is quite substantial. Applying the principles mentioned above, in the circumstances of the case I find that the prejudice that the proposed amendment will cause the plaintiffs cannot be compensated by costs. This is not a proper case to use my discretion to allow the amendment.